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No. 92-1450

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred when it held that a public employer which terminates an employee based on believable, substantiated reports of unprotected, insubordinate speech may be held liable for retaliatory discharge under the First Amendment if a jury later finds that the reports were incomplete or inaccurate and that the employee actually spoke on protected matters of public concern, when the employer's ignorance of the protected speech is the result of an allegedly incomplete investigation.[1]

2. Whether in January 1987, public officials were immune from individual liability for discharging an employee based on believable, substantiated reports of unprotected, insubordinate speech that were later found to be incomplete or inaccurate – because (a) it was clearly established that insubordinate speech was not protected by the First Amendment and (b) it was not clearly established that public officials had a duty to investigate beyond interviewing the reporter of the speech three times and the recipient of the speech once and allowing

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[1] Fairly comprised within this question is the issue of whether the Seventh Circuit erred when it held that a jury could find that plaintiff Cheryl Churchill engaged in protected speech and that defendants were motivated by this speech when they terminated her employment.

QUESTIONS PRESENTED – Continued

the discharged employee an opportunity to discuss the speech in question.[2]

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[2] If this Court affirms the court of appeals' holding as to the first question presented but holds that the individual defendants were immune from liability, the Court may reach the question of the defendant public hospital's liability. Accordingly, Petitioners address this question herein.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital and the respondents Cheryl R. Churchill and Thomas Koch, M.D.

Rule 29.1 Statement

Defendant McDonough District Hospital is an Illinois municipal corporation. It has no parent or subsidiary corporations.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 977 F.2d 1114 and is reprinted in the Appendix to the Petition for Writ of Certiorari at App. 1. The order of the Court of Appeals for the Seventh Circuit denying defendants' petition for rehearing and suggestion for rehearing *in banc* is reprinted in the Appendix at App. 30.

The order of the United States District Court for the Central District of Illinois awarding defendants summary judgment as to plaintiff Cheryl Churchill's First Amendment retaliatory discharge claim and dismissing both

plaintiffs' freedom of expressive association claims under Rule 12(b)(6) has not been reported. It is reprinted in the Appendix at App. 31. The district court's earlier order granting defendants' motion for summary judgment as to Churchill's Fourteenth Amendment due process and state-law contract claims is reported at 731 F. Supp. 311 and is reprinted in the Appendix at App. 51.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 15, 1992. A timely petition for rehearing with a suggestion for rehearing *in banc* was denied on December 9, 1992. The petition for writ of certiorari was filed on March 8, 1993 and was granted on June 21, 1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1.

> Congress shall make no law . . . abridging the freedom of speech. . . .

U.S. Const. Amend. 14.

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

In this Section 1983 action, Plaintiff Cheryl Churchill ("Churchill") claims that defendants McDonough District Hospital (the "Hospital"), two of its executives and Churchill's immediate supervisor violated her First Amendment rights by firing her in retaliation for comments she allegedly made about the Hospital's policy of cross-training nurses in departments to which they were not regularly assigned. She also claimed that the individual defendants' conduct violated her Fourteenth Amendment and contractual rights to due process.[3] The following facts are material to consideration of the questions presented by this case:[4]

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[3] By order dated February 16, 1990, the district court granted defendants' motion for summary judgment as to these claims, finding that Churchill had no contractual right to (and thus no property interest in) continued employment. (Appendix to Petition for Writ of Certiorari ("App.") 70). By the time the district court disposed of this case, Dr. Thomas Koch ("Koch") had been added as a party-plaintiff who claimed that defendants retaliated against him for his opposition to the cross-training policy. Koch's claim was dismissed for failure to present a justiciable controversy. (App. 39). In the court of appeals, plaintiffs did not raise any issue as to dismissal of Koch's claim.

[4] Since the context here is summary judgment, defendants set forth herein only those facts that are both uncontroverted in the discovery filed in the trial court and relevant to the questions presented. Below, Churchill purported to dispute many of these facts, but her disputations were unsupported by record

A. History of Churchill's Employment

Churchill worked at the Hospital as a registered nurse in the Obstetrics ("OB") Department. (R. 146, Third Amended Complaint, Count I, ¶ 10). During the final year of her employment, Churchill repeatedly engaged in behavior toward Defendant Cynthia Waters ("Waters"), her immediate supervisor, which was considered by her superiors to be both rude and insubordinate. This behavior was observed not only by Waters but also by other nurses in the OB Department. (R. 72: Waters Dep. 11/19/87, pp. 245-53, 356, 386-87; Ballew Dep. 8/22/87, pp. 91-94; Haney Dep. 11/17/87, pp. 22-24, Ex. 8; Osmon Dep. 11/17/87, pp. 16-17, 20-23, 47, 52-53, 60).[5] For example, one nurse testified that Churchill polished her nails during departmental meetings, displayed "indifference and total disregard for authority," called Waters a "fat

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evidence. The court of appeals relied in its opinion on some of her non-record assertions, including some mere recitations from her Third Amended Complaint. (*See, e.g.*, App. 3-4, 13). The court thus departed from the well-settled principle that on summary judgment, the nonmovant may not create genuine issues by referring to complaint allegations, but instead must come forward with sufficient *evidence* to sustain a jury verdict in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

[5] The parties submitted appendices to the trial court containing the discovery documents upon which they relied in support of or opposition to their respective motions for summary judgment. These appendices are designated as: Appendix of Exhibits in Support of Defendants' [First] Motion for Summary Judgment ("R. 72"); Appendix to Plaintiff's Response to Defendants' Motion for Summary Judgment ("R. 76"); [Plaintiffs'] Supplemental Appendix ("R. 92"); Appendix of Exhibits in Support of Defendants' [Second] Motion for Summary Judgment ("R. 137").

slob," demonstrated her disrespect for Waters through negative body language, comments and expressions, and disobeyed her superiors. (R. 72, Osmon Dep. 11/17/87, pp. 16-17, 20-23). This nurse reported Churchill's behavior to defendant Kathleen Davis ("Davis"), the Hospital's vice president of nursing. (*Id.*, pp. 47, 52-53).[6] Nurse Mary Lou Ballew ("Ballew") testified that Churchill told her that Churchill "didn't want to have [Waters's] name said in her presence." (R. 72, Ballew Dep. 8/27/87, p. 91).[7]

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[6] Churchill does not (and cannot) deny that this nurse reported Churchill's behavior to Davis; she disputes that it occurred, but does not say why the nurse would have lied about her.

[7] Churchill's insubordination began in 1986 after she developed a close personal relationship with Dr. Thomas Koch ("Koch"), the clinical head of the OB Department. (R. 76: Hopper Dep. 1/8/88, p. 75; Waters Dep. 11/18/87, pp. 208-09; Davis Dep. 8/27/87, p. 129; Lefler Dep. 11/7/89, pp. 27-29, 43-44; R. 92: Auten Dep. 10/12/88, p. 18; Beck Dep. 10/12/88, pp. 32-34; Horney Dep. 10/12/88, p. 19; Greene Dep. 10/13/88, p. 7; Mohr Dep. 10/13/88, pp. 22-23; Weis Dep. 10/17/85, pp. 39-40). Churchill and Koch subsequently married. (App. 4). Several of Churchill's fellow nurses reported to the Hospital administration that this social relationship with Koch contributed directly to Churchill's performance and attitude problems in the last months of her employment. (R. 76, Hopper Dep. 1/8/88, p. 75; R. 92: Beck Dep. 10/12/88, pp. 32-34; Mohr Dep. 10/13/88, pp. 22-23).

Waters counseled Churchill several times about the negative effect her relationship with Koch seemed to be having on her performance. (R. 76: Waters Dep. 11/18/87, pp. 141-42, 223-25; Waters Dep. 11/19/87, pp. 356-57; Churchill Dep. 10/4/88, pp. 76-78; Davis Dep. 8/27/87, pp. 129, 136, 225). Although Churchill alleges that defendants disliked Koch because of his criticism of nurse staffing policies, there is no record evidence to support this allegation. Instead, the record reveals that allegations of Koch's abusive behavior toward Hospital staff and patients

Churchill was counseled on several occasions regarding her negative behavior toward Waters. (R. 72: Waters Dep. 11/18/87, pp. 100-01, 109-16, 141-42; Waters Dep. 11/19/87, pp. 245-55, 280-85, 299-303, 381-82, 386-87). But Churchill's perceived behavior problems continued even after she received a written warning. The written warning followed other incidents of rude behavior and a specific confrontation between Churchill and Waters during an emergency Caesarean section ("C-section"). (R. 72: Haney Dep. 11/17/87, pp. 22-24, Ex. 1; Waters Dep. 11/19/87, pp. 280-85, 299-300). Churchill has admitted receiving the following warning after this incident:

> REASON FOR WARNING: (1) Insubordination – When had to be asked twice to leave the delivery area, you responded to me [Waters] in a very hostile manner, "I don't need you to tell me how to do my work." (2) General negative attitude and lack of support towards nursing administration in the OB Department.[8]
>
> WARNING GIVEN: Insubordination and/or lack of cooperation will not be tolerated in the future as it is very detrimental to the operations of the OB Department. Any future occurrence of this behavior will be subject to further disciplinary action which may include assignment to another nursing area *or discharge*.

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caused the Hospital administration concern. (R. 92, Supplemental Affidavit of Koch, Ex. 27).

[8] The warning about "[g]eneral negative attitude and lack of support" referred to a pattern of insubordinate behavior by Churchill toward Waters about which Waters already had counselled Churchill. (R. 76: Waters Dep. 11/19/87, pp. 356-57; Magin Dep. 11/20/87, pp. 124-26). Thus, the court of appeals erred when it stated that there was no evidence of an oral warning prior to this incident.

(R. 72, Churchill Dep. 10/4/88, Ex. 9) (the "Record of Warning") (emphasis added). Although both the warning form and Hospital procedures provided that Churchill could submit a written response, she chose not to do so, saying she did not wish to make "mountains out of molehills" and that she considered the complaint against her as "trite." (R. 72, Churchill Dep. 10/4/88, pp. 136-38). She also did not file a grievance protesting the warning.[9]

During the summer of 1986, Davis instituted a program of cross-training nurses. Under the program, nurses from other departments were trained in the work of busy departments like OB, in which they did not ordinarily work, so that they would be able to fill in when needed. (R. 72, Davis Dep. 8/27/87, pp. 24-27, 29).

There is no evidence that Waters and Churchill ever disagreed about implementation of cross-training. To the contrary, Churchill's deposition testimony reveals that her few exchanges with Waters about cross-training were low-key and amicable, and that Waters agreed with some of Churchill's points. (R. 76: Churchill Dep. 11/1/88, pp. 208, 211-20, 222-23, 225, 227; Churchill Dep. 3/2/89, pp. 385-88). Waters testified she did not even remember Churchill "particularly talking to me about it." (R. 76, Waters Dep. 11/18/87, p. 56). There was no "vocal criticism" (App. 3) by Churchill of cross-training or any annoyance or anger on Waters's part. (R. 76: Churchill Dep. 11/1/88, pp. 217-18, 222-23, 225; Churchill Dep. 3/2/89, pp. 385-86).

Churchill's experience was consistent with that of other nurses, most or all of whom voiced concerns about

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[9] Witnesses to the C-section incident differed as to whether Churchill's conduct during the operation itself was helpful or not. But it is undisputed that Churchill made the insubordinate comment to Waters that was the subject of the first part of the warning.

the cross-training program and none of whom was disciplined or chastised in any way. (R. 72: Welty Dep. 10/12/88, pp. 33-35, 54-57; Welty Dep. 4/6/89, pp. 205-07). Davis's unrefuted testimony was that she was "anxious" to hear about perceived problems with the cross-training program, so she could attempt to fix them. (R. 76, Davis Dep. 8/27/87, pp. 43-45, 49-50, 81).

The next written counseling Churchill received appeared in her annual evaluation dated January 5, 1987, in which Waters wrote:

> Cheryl exhibits negative behavior towards me and my leadership through her actions and body language, *i.e.* no answer, one word abrupt answers followed by turning and leaving, blank facial expressions, or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation.

(R. 72, Churchill Dep. 3/2/89, Ex. 14). Once again, Churchill submitted no written response to this counseling, despite the fact that both the evaluation form (*id.*, final page) and Hospital policy permitted her to do so. (R. 72, Churchill Dep. 3/2/89, pp. 405-06).[10] Churchill testified that she did not write a response because she had nothing "earth shattering" to say and because she would have had to come in early to do so. (R. 72, Churchill Dep. 3/2/89, p. 404). She also did not file a grievance over the evaluation. Below, Churchill did not deny engaging in the conduct Waters described. (*Id.*, pp. 386, 405).

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[10] Churchill was well aware of her opportunity to submit a written response, since she had added comments to every one of her prior evaluations. (R. 72: Churchill Dep. 10/4/88, Evaluations of 11/4/83, 7/6/86, 5/13/85, 1/2/86, and 7/7/86).

B. Reports of Negative, Insubordinate Speech on January 16, 1987

On January 16, 1987, Melanie Perkins-Graham ("Graham"), a registered nurse, was assigned to the Hospital's OB Department as part of the cross-training program. The department had had staffing problems,[11] and defendants were trying to get nurses from other departments to transfer to OB. (R. 72: Davis Dep. 8/28/87, p. 50; Hopper Dep. 3/16/88, pp. 50, 52). During the 3:00 p.m. - 11:00 p.m. shift that day, Ballew, a registered nurse regularly assigned to the OB Department, overheard comments made by Churchill to Graham during a conversation in the Department's kitchen area. (R. 137, Ballew Dep. 8/27/87, pp. 94-95, 102, 109-10). At Ballew's deposition, Churchill's counsel accurately summarized some of what Ballew said she heard as follows:

> . . . You heard Cheryl say that Cindy was out to get Cheryl fired. You heard Cheryl say that Cindy had complained about treatment that Cheryl gave a patient which Cheryl denied but Cindy persisted in her accusation. You heard Cheryl say that she disapproved of the [OB Department's] check list. You heard Cheryl say that she always scheduled her own duty when three RNs were on board so that Cheryl would be less exposed to being called. You heard Cheryl complain that Cindy was not a good manager and didn't run the department well. . . .

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[11] This was a point on which Churchill, Koch and defendants *agreed*. Thus, there was no reason for defendants to be angry or upset when staffing problems were discussed (another false factual premise of Churchill's claims).

(R. 76, Ballew Dep. 8/27/87, pp. 111-12; *see also id.*, pp. 94-97, 102-03, 105-06; R. 76, Ballew Dep. 10/26/88, pp. 105-07).

Upset by what she heard, Ballew approached Waters on January 20, 1987, and informed her that "Cheryl took Melanie the cross-trainee into the kitchen for a period of at least 20 minutes to talk about you [Waters] and how bad things are in OB in general." (R. 72, Ballew Dep. 10/26/88, Ex. 2). Ballew construed those portions of the conversation she heard as "negative and intended to dampen the enthusiasm of" Graham, and she characterized the conversation this way when she reported it to Waters. (App. 56; R. 137, Ballew Dep. 8/27/88, pp. 110-11; *see also* R. 76, Ballew Dep. 10/26/87, p. 128).

Waters communicated Ballew's report to Vice President of Nursing Davis, and they decided to meet with Graham to investigate Churchill's behavior. (R. 72, Waters Dep. 11/19/87, pp. 441-43). On January 23, 1987, Waters and Davis met with Graham and her supervisor. (*Id.*, pp. 444-48). At this meeting, Graham reported that Churchill (1) "said unkind and inappropriate negative things about Cindy Waters"; (2) "had discussed her evaluation quite a bit"; (3) "stated that [Waters] had wanted to wipe the slate clean and have things get better but this wasn't possible"; (4) "stated that just in general things were not good in OB and hospital administration was responsible"; and (5) "stated that [Davis] was ruining MDH [the Hospital]." (R. 72, Waters Dep. 11/19/87, Ex. 7; *see also* R. 72: Davis Dep. 8/28/87, pp. 286-92; Graham Dep. 9/15/87, p. 82). In the district court, Churchill conceded that Waters and Davis *never* were informed that Churchill had discussed cross-training with Graham. (R. 75, p. 89; App. 22 (noting that "Churchill *alleges* . . . they were unaware of the actual content of her January 16, 1987 conversation") (emphasis added)).

At her deposition, Graham confirmed the accuracy of Waters's and Davis's accounts of their interview with Graham. She also described Churchill's comments as follows: (1) "the overall message was not a positive one as far as her relationship with Cindy [Waters]"; (2) [Churchill] "shar[ed] with me about her evaluations with Cindy"; (3) "she told me that she and Cindy didn't get along"; (4) "Cheryl was telling me that Cindy had said that she thought they should wipe the slate clean and try to start anew and so forth and Cheryl said that she told her [Waters] that that wasn't possible"; (5) "[Waters] didn't do much"; (6) "the general gist . . . was negative feelings between Cheryl and [Waters]"; and (7) "[Davis] was going to ruin the hospital." (R. 72, Graham Dep. 9/15/87, pp. 47-48, 73-78).

On January 26, 1987, Waters continued the Hospital's investigation by again interviewing Ballew, who said that Churchill (1) "was knocking the department"; (2) stated that Waters "was trying to find reasons to fire her" and had continued to blame Churchill for a patient complaint that was not Churchill's fault; and (3) "was saying what a bad place [OB] is to work." Ballew assured Waters "she would be willing to swear this was all true." (R. 137, Ballew Dep. 8/27/87, pp. 94-95, 106-16, Ex. 2).

Based on the reports they received from Ballew and Graham, Waters and Davis believed that Churchill was continuing her insubordinate and negative behavior – about which she had received written counseling only two weeks before. (R. 72: Davis Dep. 8/28/87, pp. 284-85; Waters Dep. 11/19/87, pp. 436-37). In Davis's view, the comments Churchill was accused of making were "against everything we were striving for to make it an attractive place to work, getting people to want to work down there, so this was a very negative thing to happen at that particular time." (R. 72, Davis Dep. 8/28/87, p.

303). Waters saw the comments as yet another manifestation of Churchill's negative and insubordinate behavior – "the straw that broke the camel's back." (R. 72, Waters Dep. 11/19/87, pp. 435-37). Davis and Waters concluded that Churchill's continuing insubordination merited termination. (R. 72, Davis Dep. 8/28/87, pp. 284-85, 330-31).

Davis (who was in charge of the investigation at this point) testified that she did not talk to Churchill before coming to this conclusion because she "felt like [she] had enough information" after Graham confirmed Ballew's account of Churchill's comments and gave additional details of the conversation. (R. 76: Davis Dep. 8/28/87, p. 321; Davis Dep. 6/6/89, pp. 110-11). Davis "did not hear that anyone else was in the room" and so did not talk to Koch (who claimed at his deposition that he was present during the conversation) or nurse Jean Welty ("Welty") (who claimed at her deposition that she overheard Graham and Churchill talking). (R. 72, Davis Dep. 8/28/87, pp. 321-22). Both Graham and Ballew testified they did not remember Koch being present during the conversation. (R. 72: Graham Dep. 9/15/87, pp. 71-73; Graham Dep. 2/6/89, pp. 45-47; Ballew Dep. 8/27/87, pp. 99, 107-08; Ballew Dep. 10/26/88, pp. 132-33).

Waters and Davis met with Churchill on January 27, 1987.[12] According to Churchill, Waters and Davis told her

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[12] Before the meeting, Waters and Davis discussed the appropriate response to Churchill's apparent insubordination with Defendant Stephen Hopper ("Hopper"), the Hospital's president. (R. 72: Davis Dep. 8/28/87, pp. 302-03, 308-12; Waters Dep. 11/19/87, pp. 441, 449-57; Hopper Dep. 3/16/88, pp. 5-13, 26, 32-42). Although Hopper was consulted, he did not make the decision to terminate Churchill. (R. 72, Hopper Dep. 3/16/88, p. 37). Davis and Waters had the authority to make the termination decision (*id.*, pp. 34-35) although Churchill could appeal their decision to Hopper through the Hospital's grievance procedure. *See* discussion *infra*, p. 13.

they had decided to terminate her because of (1) her refusal to change her negative behavior despite being told several times that she must do so; and (2) "a conversation lasting fifteen to twenty minutes with a cross trainee who had been assigned to OB for a particular evening shift[, which] . . . was reported as being non-supportive of the department and of its administrative leadership." (R. 72, Churchill Dep. 3/2/89, pp. 405-06, Ex. 15).[13] Churchill did not address these charges but instead voiced complaints about the manner in which the OB Department was managed. (R. 72, Churchill Dep. 3/2/89, pp. 405-06, Ex. 15). Before the meeting was over, Bernice Magin ("Magin"), the Hospital's vice president of human resources, arrived. Churchill asked Magin if there was anything Churchill could do about the decision to terminate her. Magin referred Churchill to the Hospital's grievance procedure and "handed [her] a copy of that procedure from the Employee's Handbook." (*Id.*, p. 408, Ex. 15).

Churchill filed a grievance with Hopper regarding her complaint that she had been "unjustifiably discharged" and terminated "based on rumors and gossip." (*Id.*, Ex. 17). On February 6, 1987, Churchill met with Hopper and Magin to discuss her grievance. According to Churchill, Hopper asked her to discuss (1) her "first warning" regarding the C-section incident; (2) "the comments Cindy had written on my last evaluation"; and (3) "the incident regarding my talking about Cindy and Mrs. Davis, with negative overtones, one evening while working in OB with a cross-trainee working the same shift with me." (*Id.*, p. 418; App. 75-77).

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[13] Davis testified she did not mention Ballew by name because she feared "repercussions" from Koch against Ballew. (R. 76, Davis Dep. 8/28/87, p. 297).

Although Hopper never mentioned Graham or Ballew by name,[14] Churchill knew who he was talking about – she testified, "[Graham] was the only one I could think of that I had worked with in the recent past that might have been the person that they were referring to." (R. 76: Churchill Dep. 3/2/89, p. 412).[15] *Churchill did not tell Hopper and Magin that she had discussed the impact of cross-training on patient care or any related subject with Graham.* (R. 76: Hopper Notes of Meeting with Churchill; Magin Notes of Meeting with Churchill (Tabs 50, 51); *see also* App. 75-77; R. 72, Churchill Dep. 3/2/89, pp. 413-15).

As part of his own investigation of Churchill's grievance, Hopper reviewed Waters's and Davis's written reports of their conversations with Ballew and Graham and Churchill's Record of Warning and 1987 evaluation. (R. 72, Hopper Dep. 1/8/88, p. 143). Hopper also had Magin interview Ballew one more time after the grievance meeting with Churchill. (R. 72, Hopper Dep. 7/12/88, pp. 4, 6-9, Ex. 19). Ballew confirmed the substance of her report to Waters regarding Churchill's negative comments about Waters and Davis. (*Id.*). After reviewing the information available to him, Hopper

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[14] Hopper explained this as follows: "I had a concern that if I shared the name of the individual that reported her or that she spoke with that Dr. Koch would take it out on that employee or employees." (R. 76, Hopper Dep. 1/8/88, p. 154).

[15] Churchill testified as follows:

Q And you thought that at the time –

A Yes.

Q – of your discharge, that it was a conversation with Melanie Perkins Graham that was involved in your discharge?

A That was the only person that I remembered having any discussion with, the only cross trainee that I'd had any discussion with.

(R. 76, Churchill Dep. 3/2/89, p. 412).

decided not to overrule Davis's and Waters's decision to terminate Churchill's employment. His decision was based on Churchill's pattern of negative, insubordinate behavior, of which the comments reported by Ballew were the latest example. (R. 72: Churchill Dep. 3/2/89, Ex. 20; Hopper Dep. 1/8/88, pp. 24-31; Hopper Dep. 3/16/88, pp. 39-40, 43-63; Hopper Dep. 7/12/88, pp. 11-13).[16]

Hopper found Churchill's reported comments about Davis and Waters objectionable not only because of their negative, insubordinate content but also because Churchill was voicing complaints about her superiors during working hours to a fellow nurse who was being cross-trained. (R. 72: Hopper Dep. 1/8/88, pp. 156-59; Hopper Dep. 3/16/88, pp. 43-63). Hopper found it inappropriate that Churchill discussed with Graham purely "personal issues," such as Waters's counseling of Churchill regarding her treatment of a patient and regarding Churchill's negative attitude and behavior. (R. 72: Hopper Dep. 1/8/88, p. 161; Hopper Dep. 3/16/88, pp. 43, 59). Hopper also believed that Churchill was attempting to undermine Davis and interfere with Hospital operations by discouraging Graham from working in the very department in which she was training. (R. 72: Hopper Dep. 1/8/88, p. 158; Hopper Dep. 3/16/88, pp. 49-63). Hopper testified:

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[16] On February 12, 1987, Hopper sent Churchill a letter in which he stated:

> In view of the seriousness of the latest reported incident and the fact that you previously received a written warning on August 25, 1986, as well as continued written counselling on your January 5, 1987 performance appraisal, I find that the decision to terminate your employment at McDonough District Hospital was appropriate.
>
> (R. 72, Churchill Dep. 3/2/89, Ex. 20).

> I guess the context of the issue is what bothers me, that an employee was knocking his department in front of somebody that was brought down to cross train and become trained in that area, and I do have a problem with it and I think it is an area [in] which discipline would be appropriate.

(R. 72, Hopper Dep. 3/16/88, p. 63).

C. Decisions Below

Churchill claimed that Hopper, Davis and Waters all violated her First Amendment rights by allegedly terminating her in retaliation for her comments to Graham, which Churchill said constituted protected speech. (R. 146, Third Amended Complaint, Count I). She also claimed that the Hospital was liable for the alleged violation either because the individual defendants were acting pursuant to some unconstitutional policy of the Hospital or because Hopper was a "policymaker." (*Id.*, Count III, ¶ 19).

Defendants moved for summary judgment on the following grounds: (1) Churchill's statements to Graham (regardless of the version) did not constitute protected speech because Churchill was not seeking to enlighten Graham on issues of public concern but was simply airing her own personal disagreements with her superiors; (2) the Hospital's legitimate need to maintain discipline and harmony among co-workers outweighed Churchill's interest in making the comments she made to Graham; (3) the speech reported to defendants was unprotected as a matter of law, and defendants were unaware of any protected speech at the time they made the decision to terminate Churchill; (4) the individual defendants were immune from liability because their actions were not clearly proscribed by the law in effect at the time of

Churchill's termination, in light of the specific facts confronting them when they acted; and (5) the Hospital could not be held liable for any alleged constitutional violation because the individual defendants were not acting pursuant to any unconstitutional policy or custom of the Hospital.[17] The district court granted summary judgment on the first two grounds and did not reach the last three.[18] The court stated:

> . . . Even assuming that Churchill's statements to Perkins-Graham were the reason for her discharge, those statements (regardless of the version) were, as a matter of law, not protected speech, and therefore any termination in response to them does not violate Churchill's First Amendment rights. Moreover, even if Churchill's speech were protected, the balancing approach of *Pickering v. Board of Education*, 391 U.S. 563 (1968) favor [sic] upholding the Defendants' actions and denying Churchill's claims.

(App. 45).

The district court found that the content, form and context of Churchill's speech rendered them unprotected. (App. 47-48). "Churchill did not espouse her opinions to a public audience or to authorities with power to make changes in policy. Rather, Churchill was repining to a co-worker in a coffee-room atmosphere." (App. 47). The

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[17] Churchill filed a cross-motion for summary judgment, contending that defendants' alleged failure to properly investigate the actual content of her speech violated her right to due process under the First Amendment. The district court denied this motion, a decision affirmed by the Seventh Circuit. (App. 31, 28-29).

[18] The district court also dismissed (pursuant to Rule 12(b)(6)) Churchill's claim that her termination violated her right of "expressive association" with Koch. (App. 42-43). The Seventh Circuit affirmed this dismissal. (App. 10 n.6).

Court held that the context of Churchill's remarks ("a history of hostility" and "repeated in-fighting") made it "clear that Churchill's purpose or motive in making these statements to Perkins-Graham . . . was to air her own personal grievances . . . not to speak out on matters of public concern." (App. 48).

Applying the *Pickering* balancing approach, the court found that Churchill's comments were "inherently disruptive" to the Hospital's interest in maintaining discipline or harmony among co-workers and encouraging close and personal relationships between Churchill and her superiors. (App. 49).

The Seventh Circuit reversed, holding that "the district court inappropriately resolved material issues of fact against Churchill in holding that her speech was not a matter of public concern" and "was critical and disruptive of the hospital's interests." (App. 9, 15-19). The court went on to reach the issues not addressed by the district court. It held that defendants, including the individual defendants, could be held liable despite their lack of knowledge of Churchill's protected speech. The court stated:

> We hold that when a public employer fires an employee for engaging in speech, and that speech is *later* found to be protected under the First Amendment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* [emphasis in original] at the time of termination. If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing *whether it was deliberate or accidental.*

(App. 25) (emphasis added unless otherwise noted).

The Seventh Circuit also rejected the individual defendants' claim of qualified immunity. The court held that "in 1987 the law was clear that the speech of public employees while at work was protected under the First Amendment if it was about matters of public concern" and that "it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." (App. 27).

SUMMARY OF ARGUMENT

Public workplaces are no less susceptible to the disharmony caused by insubordination than are their private counterparts. In *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court recognized the necessity of allowing public employers to eliminate such disharmony by removing employees guilty of insubordinate speech. Even when an employee's speech arguably includes matters of public concern protected by the First Amendment, a public employer is privileged to discharge the employee if her First Amendment rights are outweighed by "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150; *Pickering*, 391 U.S. at 568 (the "*Pickering* balance"). A public employer need not "tolerate action which he *reasonably believe[s]* would disrupt the office, undermine his authority, and destroy close working relationships." *Connick*, 461 U.S. at 154 (emphasis added).

While acknowledging these basic constitutional principles, the Seventh Circuit nevertheless held that a public employer which terminates an employee based on reports of unprotected, insubordinate speech may be held liable

for retaliatory discharge under the First Amendment if a jury later finds that the reports were incomplete or inaccurate and that the employee actually spoke on matters of public concern. Although it expressly rejected Churchill's claim of a right to due process under the First Amendment (App. 23, 24 n.9),[19] the court below nevertheless held that an employer unaware of protected speech because of "an inadequate investigation"[20] may be held liable for retaliatory discharge "regardless of what the employer *knew* at the time of termination" and even if its lack of knowledge was "accidental." (App. 25, 29) (emphasis in original).

I.

A. This unprecedented holding conflicts with this Court's requirement that protected speech be a "substantial" or "motivating" factor in the termination decision for a constitutional violation to be found. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). In *Mt. Healthy*, the Court relied on earlier decisions requiring proof of "discriminatory intent" in cases of unconstitutional discrimination based on race. *Id.* (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977), which cited *Washington v. Davis*, 426 U.S. 229 (1976)). There is no evidence that

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[19] In so doing, the court noted that in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court "did not establish any type of procedural protections and thus did not create a First Amendment due-process right." (App. 24 n.9).

[20] The court did not discuss how much investigation an employer need do to meet this requirement, and it did not identify the constitutional source of this requirement.

defendants *ever* were informed that Churchill had discussed issues of public concern with Graham. Thus, they could not have intended to retaliate against Churchill for her allegedly protected speech when they made the decision to terminate her. Defendants also could not have had the requisite unconstitutional intent because *Connick* expressly permits termination based on the type of speech reported to defendants.

The district court properly struck the *Pickering* balance in defendants' favor. Defendants reasonably believed that Churchill's reported comments were intended to sabotage their effort to get Graham interested in OB. They also concluded that Churchill's insubordinate behavior had created an irreparable rift between her and her supervisor in a department where such disharmony might endanger delivery of appropriate health care. The substantial interest of the Hospital in eliminating such threats to its operations outweighed Churchill's interest in expressing her dissatisfaction to Graham. Such expressions of discontent do not address issues of public concern and are unprotected under *Connick*.

B. This Court need not imply a "duty to investigate" under the First Amendment because *Mt. Healthy* provides all the protection public employees need. It does so by prohibiting adverse action in *retaliation for* the exercise of protected speech. If there is no such retaliatory motive, this "ends the constitutional inquiry." *Arlington Heights*, 429 U.S. at 270-71. *Connick* permits employers to act on their "reasonable beliefs." Before deciding to terminate Churchill, defendants spoke with Graham, who confirmed both the content and tone of Churchill's comments. Defendants interviewed Ballew twice before they made the initial decision to terminate Churchill and once after Churchill's grievance meeting with Hopper and Magin. There is no evidence defendants had any reason

to question Graham's or Ballew's credibility. In her meetings with Waters, Davis, Hopper and Magin, Churchill said nothing that was inconsistent with Ballew's and Graham's reports.[21] On this undisputed record, there is no basis on which to find "unreasonable" defendants' belief that Churchill had engaged in unprotected, insubordinate conduct.

II.

A. The individual defendants are immune from liability because in January 1987, when they acted, it was clearly established by *Connick* that insubordinate conduct like that reported by Ballew and Graham was not protected by the First Amendment and it was not clearly established that defendants had a duty to investigate beyond what they did here. The immunity of public officials from individual liability for alleged constitutional violations must be determined based on the "objective legal reasonableness" of their actions, "assessed in light of the legal rules that were 'clearly established' at the time [those actions were] taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). The holding here, which appears to run contrary to *Mt. Healthy* and every case on point, cannot be said to state law that was "clearly established" six years earlier when defendants acted.

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[21] Even if Churchill had been given full specifics as to the Graham conversation, and had made a complete denial, the problem would not have gone away. It would have been the word of two disinterested persons against Churchill's self- serving denial. On the facts here, discharge would still have been appropriate. A more exhaustive "investigation" was a false trail down which Churchill led the court of appeals.

B. The individual defendants also were immune because they "could have believed" that their actions were lawful based on the information they possessed at the time they acted, even if they were mistaken. *Hunter v. Bryant*, 112 S. Ct. 534, 536-37 (1991) (per curiam); *Anderson*, 483 U.S. at 641.

III.

A. The Hospital cannot be held liable for the "inadequate investigation" alleged by Churchill because such inadequacy would have been contrary to, not mandated by, Hospital policy. "[T]he hospital's policy *requires* supervisors to provide [employees] notice and an opportunity to present their case and discuss their point of view." (App. 72) (emphasis added).

B. Churchill claims that the Hospital is liable under Section 1983 because she was fired pursuant to a policy "requiring that all employees of the Hospital . . . who criticize Hospital policy, do so only by directing such criticism to supervisory personnel." (R. 146, pp. 6-7). There is no evidence of any such policy.

C. The Hospital cannot be held liable merely because Hopper approved the decision to terminate Churchill. Even if Hopper's approval of Churchill's termination somehow violated the First Amendment, this single act could not have constituted a new unconstitutional *policy*, given the Hospital's already existing policy and practice of encouraging, not punishing, expression of employee concerns. *See St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

ARGUMENT

I.

DEFENDANTS DID NOT VIOLATE THE CONSTITUTION WHEN THEY TERMINATED CHURCHILL BASED ON BELIEVABLE, SUBSTANTIATED REPORTS OF UNPROTECTED, INSUBORDINATE SPEECH

A. Churchill's Retaliatory Discharge Claim Fails Because There Is No Evidence That Any Protected Speech Was a "Substantial" or "Motivating" Factor in Her Termination.

1. Defendants Did Not Have the Retaliatory Intent Required by *Mt. Healthy*.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court addressed the state-of-mind requirement applicable to First Amendment retaliatory discharge cases. *Id.* at 283-87.[22] In such cases, the plaintiff must "show that [her] conduct was constitutionally protected, and that this conduct was a 'substantial factor' – or to put it in other words, that it was a 'motivating factor' in the [employer's] decision" to terminate her. *Id.* at 287.

There is no evidence that defendants *ever* were informed that Churchill had discussed cross-training with Graham. Thus, defendants could not have been motivated by Churchill's allegedly protected speech when they made the decision to terminate her. In the Seventh Circuit's view, this undisputed fact is "immaterial" and defendants may be held liable if Churchill's speech eventually is found to have been protected

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[22] "[Section] 1983 . . . contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986).

"regardless of what [they] knew at the time of termination" and even if their alleged violation of Churchill's rights was "accidental." (App. 25, 29). This holding conflicts with *Mt. Healthy's* requirement that protected speech be a "substantial" or "motivating" factor in the termination decision for a constitutional violation to be found.

In *Mt. Healthy*, the Court relied on earlier decisions requiring proof of "discriminatory intent" in cases of unconstitutional discrimination based on race. 429 U.S. at 287 (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977), which cited *Washington v. Davis*, 426 U.S. 229 (1976)). Thus, the constitutional tort recognized in *Mt. Healthy* is an intentional one – the plaintiff must prove "that the defendant's *intent* . . . to violate the plaintiffs' constitutional rights was a substantial motivating factor in the employment decision." *Tanner v. McCall*, 625 F.2d 1183, 1192 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981) (citing *Mt. Healthy*, 429 U.S. at 287; *Washington*, 426 U.S. 229) (emphasis added).[23] Defendants could not have *intended* to punish Churchill for protected speech of which they were unaware. *See O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1369-70 (7th Cir.), *petition for cert. filed*, July 12, 1993.

The court of appeals apparently believed that a constitutional violation can be found here if the *effect* of defendants' action was to terminate Churchill because of her protected speech, even if that was not their intent. But this holding cannot be reconciled with the Court's

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[23] See *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("In the absence of any claim that the public employer was *motivated by* a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.") (Emphasis added).

decisions in *Washington* and *Arlington Heights*. In both cases, the plaintiffs alleged that the defendants' actions denied them equal protection because they had the effect (but not the intent) of excluding them on the basis of their race. The Court rejected those claims, holding that a racially "discriminatory purpose" must be a "motivating factor" for the Constitution to be violated. *Arlington Heights*, 429 U.S. at 270-71; *Washington*, 426 U.S. at 239.[24]

The court of appeals' holding that defendants can be held liable under the First Amendment even if their lack of knowledge of Churchill's protected speech was "accidental" establishes a negligence standard which also runs afoul of this Court's precedents. Even if, as the Seventh Circuit incorrectly assumed, defendants did not take care to insure that their investigation was complete, their alleged negligence is not a cognizable claim under the First Amendment.

In *Daniels*, this Court held that mere negligence does not work a deprivation under the due process clause because the word "deprive" connotes more than a negligent act. 474 U.S. at 330 (citing Justice Powell's concurrence in *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981)).[25] In its First Amendment cases, this Court has proscribed

[24] The *Washington* Court relied on cases involving exclusion of blacks from juries, gerrymandering cases, and school desegregation cases, in all of which the Court found that there must be some "purpose" or "intent" to discriminate. *Id.* at 239-40 (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973); *Alexander v. Louisiana*, 405 U.S. 625, 628-29 (1972); *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Akins v. Texas*, 325 U.S. 398, 403-04 (1945)).

[25] "Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person," a failure which does not rise to the level of a constitutional violation. *Daniels*, 474 U.S. at 332.

adverse action taken *"by reason of"* or *"motivated"* by the "exercise of constitutionally protected First Amendment freedoms,"[26] *Mt. Healthy*, 429 U.S. at 283-84, 287, and the denial of benefits *"because of . . .* constitutionally protected speech or associations." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (emphasis added). Similarly, in *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court held that removal of books from a library violated the First Amendment only if the defendants *"intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor[27] in [defendants'] decision." *Id.* at 871 (plurality opinion) (emphasis in original). Like the concept of "deprivation" under the due process clause, the language of these cases requires something more than a negligent act.

Churchill lost her job because Waters, Hopper and Davis believed Ballew's and Graham's reports that Churchill engaged in repeated unprotected insubordinate speech, the last incident of which came after written warnings that such conduct would not be tolerated. Churchill and the court of appeals speculate that defendants might not have believed the reports of the last

[26] In *Mt. Healthy*, the Court formulated its causation requirement after noting that "[i]n other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result *caused by* a constitutional violation and one not so caused." 429 U.S. at 286-87 (emphasis added) (citing *Parker v. North Carolina*, 397 U.S. 790, 796 (1970); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963); *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

[27] "By 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* at 871 n.22 (citing *Mt. Healthy*, 429 U.S. at 287).

incident had they spoken to more persons. To hold defendants liable for what they *might have* believed based on what they *could have* done ignores this Court's instruction in its First Amendment and equal protection cases that defendants can be held liable only if they *intended* to violate the plaintiff's constitutional rights.

2. *Connick v. Myers* Expressly Permits Termination Based on the Type of Speech Reported by Ballew and Graham.

Defendants could not have had the requisite unconstitutional intent because this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), expressly *permits* termination based on the type of speech reported by Ballew and Graham. In *Connick*, this Court established a two-step analysis to resolve the tension between an employee's First Amendment rights and the right of public employers to control behavior and speech which might adversely affect their operations. 461 U.S. at 143-54. Under *Connick*, a court must first determine, as a matter of law, whether the employee's speech "addressed a matter of public concern." *Id.* at 147. The court must examine the content, form and context of the employee's speech "as revealed by the whole record." *Id.* at 147-48. If the court determines that the speech addressed a matter of public concern, the court must balance the employee's First Amendment rights against the "government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150 (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)) (the "*Pickering* balance").

By allegedly engaging in protected speech, Churchill did not insulate herself from discipline or discharge for reasons unrelated to that speech. *See Mt. Healthy*, 429 U.S. at 285-87. Churchill conceded that under *Connick*, "speech

on matters of purely personal interest or for the purpose of advancing personal grievances and the like is not protected. Furthermore, *plaintiff has no doubt that the reports submitted by Ballew and Perkins-Graham to Waters and Davis could be construed in such a fashion.*" (R. 143, p. 19)(emphasis added). The uncontroverted evidence in this case establishes that defendants *did* construe the reports in such a fashion. By holding that defendants nevertheless can be held liable if their conclusions were wrong, the decision below conflicts with *Connick* and *Mt. Healthy* by imposing liability even when the employer has shown that it based the termination decision on conduct unprotected by the Constitution.

In *Connick*, the plaintiff circulated a questionnaire expressing concerns about office transfer policy, office morale, and the level of confidence in office supervisors. 461 U.S. at 141. In words equally applicable to Churchill's reported comments, the Court held that none of these topics was a matter of public concern because the questionnaire "*would convey no information* at all other than the fact that a single employee [was] upset with the status quo." *Id.* at 148 (emphasis added). The Court held that the questionnaire, like the comments reported by Ballew and Graham, could most accurately be characterized "as an employee grievance concerning internal office policy." *Id.* at 154. "[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

The unrefuted evidence below established that Ballew's and Graham's reports precipitated Churchill's discharge and that Defendants perceived those reports as expressions of Churchill's personal dissatisfaction rather than attempts to enlighten Graham on issues of public concern. "When an employee expression cannot be fairly considered as relating to any matter of political, social, or

other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146.[28] The judicial second-guessing engaged in by the Seventh Circuit ignored these well-settled principles.

3. The Hospital's Interests in Maintaining Discipline and Eliminating Disharmony Outweighed Churchill's Interest in Making Critical Comments to Graham.

Under *Connick*, a court must strike a balance between an employee's right to engage in protected speech and the employer's right to control the workplace. The court of appeals correctly noted that an employee's First Amendment rights may be outweighed by an employer's "need to maintain discipline or harmony among co-workers" or "need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence." (App. 16-17). *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73). Defendants had an important interest in encouraging employees like Graham to train in understaffed departments like OB. They also had an important interest in maintaining harmony and a close working relationship between supervisor Waters and nurse Churchill to ensure proper patient care in the OB Department. In striking its balance, the

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[28] "Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Id.* at 146-47 (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry*, 408 U.S. 593; *Bishop*, 426 U.S. at 349-50).

Seventh Circuit failed to weigh these legitimate concerns of the Hospital against Churchill's interest in making critical comments to Graham.

Ballew reported to defendants that Churchill was deliberately attempting to dampen the enthusiasm of Graham. Deliberate attempts to sabotage a public employer's programs are not protected by the First Amendment. The court of appeals said an issue of fact exists as to whether Churchill's comments actually *had* a negative effect on Graham.[29] But the actual effect on Graham is irrelevant. *Connick* permitted defendants to use their best judgment and act on their reasonable beliefs. 461 U.S. at 154.[30] If an employer has concluded that an employee's conduct threatens to "disrupt the [workplace], undermine his authority, and destroy close working relationships," the employer is privileged to terminate the employee *before* her conduct has an adverse effect on the employer's operations. *Id.* at 154.[31]

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[29] By questioning defendants' conclusions regarding the intent and effect of Churchill's comments, the court appears to have been sitting as a " 'super-personnel department that reexamine[d] [defendants'] business decision.' " *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988) (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987)). It substituted its business judgment for defendants'.

[30] In *Connick*, this Court rejected the approach adopted by the Seventh Circuit here. The Court held that the district court there was wrong to require the employer to "clearly demonstrate" that the plaintiff's speech "substantially interfered" with her official responsibilities. *Id.* at 150. Instead, this Court focused on the public officials' "judgment" and "reasonable belief" that the employee intended her speech as an act of insubordination, rather than an attempt to enlighten her colleagues on matters of public concern. *Id.* at 151, 154.

[31] "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office

Waters testified that Churchill's reported comments were the "straw that broke the camel's back" as far as Waters was concerned. The reported comments, in the judgment of Waters and her superiors,[32] created an irreparable rift between Churchill and Waters which warranted Churchill's termination. This was especially true in light of Churchill's reported statement that an improvement in her relationship with Waters "wasn't possible." (R. 76, Graham Dep. 9/15/87, p. 74).[33]

In the OB Department, nurses work closely together under circumstances in which a lack of cooperation or disharmony could have an adverse effect on the health of a mother or her baby and on the efficient delivery of appropriate health care. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52. Once defendants reasonably believed that Churchill's observed and reported insubordination precluded the necessary cooperation, defendants were privileged to terminate Churchill's employment.

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and the destruction of working relationships is manifest before taking action." *Id.* at 151.

[32] This is the only judgment that matters under *Connick*. *See id.* at 154.

[33] In *Pickering*, the Court suggested that criticism of a superior might be unprotected if it seriously undermined the effectiveness of a working relationship. 391 U.S. at 570 n.3. *See also Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 n.3, 415 n.4 (1979).

4. The District Court Correctly Held That the Relevant Portions of Churchill's Speech Were Not Protected Because They Did Not Address Issues of Public Concern.

Much of the court of appeals' decision is based on a single incorrect premise; namely, that "there are genuine issues of material fact in dispute regarding the content of Churchill's speech." (App. 28). In order to remove any such issue of fact, defendants informed the district court that "[s]olely for purposes of their motion for summary judgment, defendants do not dispute that [cross-training and other staffing issues] may have been discussed" by Churchill during the January 16, 1987 conversation. (R. 81, p. 5).[34] In its order granting summary judgment, the district court made it clear that it was accepting Churchill's version of the conversation in question:

> [T]his Court now finds that no dispute of *material* [emphasis in original] fact exists and that summary judgment is appropriately entered in favor of the Defendants. Even assuming that Churchill's statements to Perkins-Graham were the reason for her discharge, those statements (*regardless of the version*) were, as a matter of law, not protected speech. . . .
> *No matter what alleged speech content is analyzed* (that allegedly stated by Churchill in the kitchen area of the OB department or that reported to the Defendants by Ballew and Perkins-Graham),

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[34] A substantial portion of the opinion below is devoted to the proposition that the impact of cross-training on patient care is an issue of public concern. Defendants never have contended otherwise. Once the Seventh Circuit made this point, it failed to discuss the equally well-settled proposition that comments such as those reported by Ballew and Graham do *not* address issues of public concern and are not protected by the First Amendment.

> such speech is not protected. *All of the versions of Churchill's statements* have a common denominator – all are indicative of an attempt to simply air personal grievances rather than to speak out on an issue of public concern.

(App. 45) (emphasis added unless otherwise indicated).

In rejecting this view, the court of appeals inexplicably assumed that only two, mutually exclusive versions of the conversation are possible and that a jury will have to decide between them. But the record evidence contradicts this assumption. Ballew admits she heard only a portion of the conversation, and Graham did not remember everything that was said. So it is possible that Churchill did discuss the impact of cross-training on patient care.[35] But she has never asserted that this was all she discussed. Churchill admits to a whole portion of the conversation that did not relate to cross-training or any other issue of public concern. Whether it was 50 seconds (as incorrectly asserted by Churchill) or much longer, it was this portion of the conversation that Ballew and Graham reported.

Churchill admits that she spoke about Waters and Davis during this portion of the conversation. (R. 76, Churchill Dep. 11/1/88, pp. 329-30). Churchill says Ballew got the tenor of these comments all wrong and that she was less critical of Waters and Davis personally than Ballew thought. But this makes no difference under *Connick*. The undisputed fact remains that at least *some* of Churchill's version of the conversation – the only portion reported by Ballew and Graham – did not address issues

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[35] By focusing only on this portion of Churchill's version of the conversation, the court of appeals ignored *Connick's* instruction that a court must examine the content, form and context "as revealed by the whole record." 461 U.S. at 147-48.

of public concern. Since there was no evidence defendants were motivated by anything other than Ballew's and Graham's reports, the court of appeals erred in finding a genuine issue of *material* fact as to the content of the conversation.

The Seventh Circuit also gave short shrift to the admitted context of the conversation. Graham herself was a cross-trainee, powerless to effect any change in hospital policy and as familiar as Churchill with the cross-training program. Based on these undisputed facts, the district court correctly found that even if Churchill did address cross-training, her purpose was not to enlighten Graham about the program but to air her own personal criticism. Graham perceived the break-room discussion as a "bitch session," and that is the context she communicated to Waters and Davis. While the impact of cross-training on patient care (in the abstract) would concern the public, its impact on the work routine of the two nurses would not and thus would not be protected under *Connick*. *See* 461 U.S. at 148 n.8.

The fact that Churchill was voicing her concerns to a trainee during working hours "support[ed] [defendants'] fears that the functioning of [the OB Department] was endangered" by Churchill's critical comments. *See id.* at 153. When, as here, "employee speech concerning [workplace] policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the [workplace]." *Id.*

As the district court correctly found, the recent history of disagreements between Waters and Churchill also was part of the relevant "context." In *Connick*, the appearance of the questionnaire immediately after a disagreement over the plaintiff's transfer was held to support the

employer's "judgment" and "reasonable belief" that circulation of the questionnaire was an act of insubordination. *Id.* at 151-54. Similarly, Churchill's recent history of disagreements with Waters, about which she had been counselled two weeks earlier (in the evaluation she discussed with Graham!), supported defendant's reasonable belief (and the district court's finding) that Churchill was not addressing matters of public concern when she made the comments overheard by Ballew.

B. Defendants Were Under No Constitutional Duty to Investigate More Than They Did.

1. This Court Need Not Imply a "Duty to Investigate" Under the First Amendment.

In *Connick*, this Court warned against attempts to "constitutionalize" everyday employee complaints concerning internal workplace policy. *Id.* at 154. It also cautioned against "intrusive oversight by the judiciary" of routine personnel decisions. *Id.* at 146-47. By creating a duty to investigate before an employer can react to believable, substantiated reports of insubordinate speech, the court of appeals has done precisely what the Court feared. Ironically, the court of appeals did so at the same time it *rejected* Churchill's claim of a right to due process under the First Amendment and held that "*Mt. Healthy* provides adequate safeguards." (App. 23).

Mt. Healthy does provide all the protection public employees need. It does so by prohibiting adverse action *in retaliation for* the exercise of protected speech. Thus, the employee who engages in protected speech can rest assured that he or she will not be discharged because of it without some remedy under Section 1983. She may fear that a co-worker will get her fired by falsely reporting that she has been insubordinate, which is exactly what

Churchill claimed in her state-court lawsuit against Ballew. (*See* Complaint in *Churchill v. Ballew*, No. 88-L-22 (Cir. Ct. McDonough County, August 16, 1988)). But protection against such tortious interference with employment by co-workers is to be found in state law, not the Constitution. As this Court held in *Arlington Heights*, a plaintiff's failure to prove "that discriminatory purpose was a motivating factor in the [defendant's] decision . . . *ends the constitutional inquiry*." 429 U.S. at 270-71 (emphasis added).

There is no basis in the Constitution to require public employers to continue to "investigate" once they reasonably believe reports of unprotected speech from disinterested employees with no apparent reason to lie. The court of appeals held that if a jury later finds such reports to be inaccurate, "the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental." (App. 25).[36] It is impossible to reconcile this rule of strict liability with the *Connick* Court's concern about allowing public employers sufficient latitude to manage their workplaces:

> "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency."

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[36] It is not clear how believing your employees can constitute "wrongdoing" or how such "wrongdoing" could ever be "accidental."

461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell J. concurring)).

Given the adequate safeguards provided by *Mt. Healthy* and *Connick*, there is no need to imply a duty to investigate to protect the First Amendment rights of public employees.

2. Under *Connick*, a Public Employer Need Do Nothing More Than Is Necessary to Establish a "Reasonable Belief," a Standard Met by Defendants.

Connick expressly permits a public employer to discipline an employee for engaging in conduct which it "reasonably believe[s]" is unprotected by the First Amendment. By referring to the employer's *"reasonable* belief," the Court adequately defined the standard an employer must meet to justify such discipline. If the belief that conduct was unprotected is "reasonable," the constitutional inquiry ends because no impermissible motive can be found.

This is not a case in which defendants had no reasonable basis for believing that Churchill engaged in insubordinate, unprotected conduct. In the five months preceding her termination, Churchill had been warned twice about such conduct – warnings to which she offered no oral or written rebuttal. Before deciding to terminate Churchill, defendants spoke with Graham, who confirmed both the content and tone of Churchill's comments and gave even more detail about what Churchill had said. Defendants interviewed Ballew twice before they made the initial decision to terminate Churchill, and once after Churchill's grievance meeting with Hopper and Magin. There is no evidence defendants had any reason to question Graham's or Ballew's credibility. In the meetings with Waters, Davis, Hopper and Magin,

Churchill said nothing that was inconsistent with Ballew's and Graham's reports.[37] On this undisputed record, there is no basis on which to find "unreasonable" defendants' belief that Churchill had engaged in insubordinate conduct.

The court of appeals also incorrectly assumed that some further investigation would have made a difference here. Even if Churchill had been given full specifics as to the Graham conversation, and had made a complete denial, the problem would not have gone away. It would have been the word of two disinterested persons against Churchill's self-serving denial. On the facts here, discharge would still have been appropriate. A more exhaustive "investigation" was a false trail down which Churchill led the court of appeals.

In the Seventh Circuit's view, had defendants conducted more extensive interviews and *then* concluded that Churchill had been insubordinate, they would not be liable under the First Amendment, regardless of what Churchill actually said. (*See* App. 25). The court thus focused solely on the adequacy of an investigation nowhere required by the Constitution and ignored this Court's requirement of an unconstitutional motive and its instruction that public employers may act on their reasonable beliefs. The Seventh Circuit also suggested that a

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[37] The court of appeals suggested that the grievance meeting with Hopper was a "star-chamber proceeding" in which Churchill was not given an opportunity to discuss the Graham conversation. That suggestion is apparently based on a version of the meeting suggested by Churchill in her appellate brief but wholly unsupported by the record. *See* discussion *supra*, pp. 13-14. The Seventh Circuit also took defendants to task for not interviewing Welty or Koch. There was no evidence that Defendants ever were aware that either Welty or Koch was present during the conversation. *See* discussion *supra*, p. 12.

jury's belief as to what an employee said should control over what the employer reasonably believed. The court of appeals based these holdings solely on its reading of *Mt. Healthy*, which nowhere suggests that this form of second-guessing is appropriate (or even addresses the issues raised here beyond requiring an unconstitutional motive).

II.

THE INDIVIDUAL DEFENDANTS ARE IMMUNE FROM LIABILITY BECAUSE THEY DID NOT VIOLATE CONSTITUTIONAL PRINCIPLES THAT WERE CLEARLY ESTABLISHED IN LIGHT OF THEIR REASONABLE BELIEF AT THE TIME THEY ACTED

A. In January 1987, It Was Clearly Established That the Conduct Reported by Ballew and Graham Was Not Protected by the First Amendment and It Was Not Clearly Established that Defendants Had a Duty to Investigate Beyond What They Did Here.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court held that the immunity of public officials from individual liability for alleged constitutional violations must be determined based on the "objective legal reasonableness" of their actions, "assessed in light of the legal rules that were 'clearly established' at the time [those actions were] taken." *Id.* at 639 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). The holding below, which appears to run contrary to *Mt. Healthy* and every case on point, cannot be said to state law that was "clearly established" six years earlier when defendants acted. To be sure, as the Seventh Circuit held, "the right to speak out on matters of public concern was established long before 1987." (App. 29). But in framing the issue as broadly as it did, the court ignored this Court's instruction that the right to be protected cannot be identified at a

"level of generality" which "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639.

Here, the issue properly framed was whether it was "clearly established" under *Mt. Healthy*, *Connick* and their Seventh Circuit progeny that defendants could not act based on Ballew's and Graham's reports, which stood uncontradicted by Churchill despite Hopper's request that she discuss (in Churchill's words) "the incident regarding [Churchill] talking about [Waters] and Mrs. Davis, with negative overtones one evening while working in OB with a cross-trainee working the same shift with me." (App. 75). In holding that defendants did not do enough to find out what Churchill said, the court below cited no precedent other than *Mt. Healthy*, which the Seventh Circuit acknowledged *does not address any duty to investigate*. (App. 23). As this Court has held, the lack of any relevant precedent alone undercuts any assertion that the duty described by the Seventh Circuit was "clearly established." *Procunier v. Navarette*, 434 U.S. 555, 563-64 (1978). Here, defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Id.* at 565.

As the district court correctly held,[38] the clearly established law at the time of Churchill's termination was that Churchill *could* be discharged for comments made to a co-worker if those comments were designed not to inform on matters of public concern but to complain about personal disagreements with her superiors. At the

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[38] Indeed, in order to deny the individual defendants' qualified immunity defense, this Court would have to find that laypersons Hopper, Davis and Waters should have reached a different conclusion as to their rights and obligations under the applicable law than did an experienced district court judge after full briefing by the parties.

time of Churchill's termination, Defendants were confronted with no fact indicating that Churchill was seeking to enlighten Graham on issues of public concern. Rather, Defendants knew only that Churchill had engaged in the type of "complaints over internal office affairs" consistently held unprotected by this Court and the court of appeals.

In cases decided before January 1987 (the relevant period for qualified immunity analysis), the Seventh Circuit emphasized that public employee speech is protected only when the "*point* of the speech" is to "raise . . . issues of public concern, because they are of public concern." *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (emphasis in original). The court consistently refused protection to employee comments regarding matters arguably of public concern when those comments were designed not to inform but to complain. *See, e.g., Zaky v. United States Veterans Admin.*, 793 F.2d 832, 839 (7th Cir.), *cert. denied*, 479 U.S. 937 (1986); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1257 (7th Cir. 1985); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984); *Ekanem v. Health & Hosp. Corp.*, 724 F.2d 563, 570-71 (7th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984). At the time defendants acted, it was clearly established in the Seventh Circuit that speech is *not* protected when its focus is to air a personal feeling or express *personal disagreement* with a public employer's policies. *Zaky*, 793 F.2d at 839; *Patkus*, 769 F.2d at 1257; *Yoggerst*, 739 F.2d at 296.

At the time defendants acted, it also was well-established that they could terminate Churchill if their interest in efficient operation of the Hospital outweighed Churchill's interest in expressing her dissatisfaction to Graham. Defendants reasonably believed that the remarks reported to them had been intended to discourage Graham and had destroyed the working relationship

between Churchill and Waters. Prior to this case, the Seventh Circuit had held that in such situations:

> [Q]ualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required.
>
> . . . [T]he particularized balancing required by *Pickering* is difficult even for the judiciary to accomplish. Therefore, while it may have been clear since 1968 that a citizen does not forfeit his First Amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual situation has not been well defined.

Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986).

For public officials to be liable personally, the law must clearly proscribe the allegedly unconstitutional conduct and the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). This Court has declined to adopt any bright-line rule defining the "contours" of a public employee's right to make comments such as Churchill's. In *Connick*, the Court stated:

> "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

Connick, supra, 461 U.S. at 154 (quoting *Pickering*, 391 U.S. at 569). Given the absence of such a general standard, and the wealth of cases holding unprotected the type of personal griping reported by Ballew and Graham, this

Court's qualified immunity cases preclude individual liability on the undisputed facts here.

B. Qualified Immunity Protects Defendants from Individual Liability If They "Could Have Believed" Their Actions Were Lawful Based on the Information They Possessed, Even If They Were Mistaken.

The holding below also appears to conflict with the well-settled principle that the "objective legal reasonableness" of a public official's actions must be evaluated based on the information possessed by the public official at the time he or she acted. *Anderson*, 483 U.S. at 641. At the time of Churchill's discharge, there was nothing to put defendants on notice that Ballew's and Graham's reports might be inaccurate or that Churchill's speech was intended to enlighten Graham on issues of public concern. If, based on the information in the reports, a reasonable public official *"could have believed"*[39] that Churchill's speech was unprotected under *Connick*, or that the hospital's interest in maintaining harmony among its employees outweighed any First Amendment right of Churchill under *Pickering*, then the individual defendants were entitled to immunity even if they were "mistaken." 483 U.S. at 641. "[T]he court should ask whether the [officials] acted reasonably under settled law in the circumstances, not whether another reasonable, or

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[39] In *Anderson*, this Court held that an individual defendant's *actual* belief is irrelevant to the qualified immunity analysis. *Id.* In the district court, Churchill conceded that "the reports submitted by Ballew and Perkins-Graham to Waters and Davis *could be construed* [as unprotected]." (R. 143, p. 19) (emphasis added).

more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991)(per curiam).

The Seventh Circuit held defendants to a duty to investigate never discussed, let alone clearly established, prior to this case. Then it concluded that the individual defendants "will be liable for damages for retaliatory discharge" if the jury believes Churchill, regardless of what defendants reasonably could have believed at the time of their decision. (App. 29.)[40] This unprecedented, narrow view of qualified immunity would subject public officials to individual liability *despite* the "objective legal

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[40] The Seventh Circuit did not follow its own holding in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992). In *Elliott*, the plaintiff was transferred after her employer received reports that her inability to get along with her supervisor undermined productivity in her department. *Id.* at 341, 343. The plaintiff claimed that the true motive for her transfer was her protected speech concerning a conflict of interest by the supervisor, but (like Churchill) she did not deny that the defendants had received reports of dissension in her department. *Id.* at 343. The Seventh Circuit held that the defendants were entitled to summary judgment on qualified immunity grounds because they acted on the basis of the reports. The court stated:

> [T]he question is not what the conditions in the [department] *were*; it is what the administrators reasonably believed them to have been. [Citations omitted]. *Objectively reasonable but mistaken conclusions do not violate the Constitution. If we assume that the staffers [who made the reports] were lying, this does not establish that the administrators' actions were unreasonable, given the information in their possession.* Conditions in the [department] are not relevant; *the inquiry must focus on what the defendants knew*, and whether reasonable persons in their position would have believed their actions proper given the state of the law in 1987.

Id. at 343-44 (emphasis added).

reasonableness" of their actions. When public officials' own personal assets are at stake, they need qualified immunity "to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, 457 U.S. at 806. Qualified immunity is designed to balance the right of citizens to collect damages for unconstitutional conduct against the need to encourage public officials in " 'the vigorous exercise of official authority.' " *Id.* at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). The Seventh Circuit placed no weight on one side of the scale.

III.

THE HOSPITAL CANNOT BE HELD LIABLE BECAUSE THE CONSTITUTIONAL VIOLATION ALLEGED BY CHURCHILL WOULD HAVE BEEN CONTRARY TO, NOT MANDATED BY, HOSPITAL POLICY

A. The Hospital Had No Policy of Conducting "Inadequate Investigations"

If the Court holds that a constitutional violation occurred here, the Court may reach the question of the Hospital's liability for the violation. The Hospital can be held liable only if Churchill can prove that the individual defendants were acting pursuant to some official policy or custom of the Hospital. *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 690-91 (1978). In order to prevail against the Hospital on her claim that there was an "inadequate investigation," Churchill would have to prove that the Hospital had a policy of making termination decisions without allowing employees to state their version of events.

As the district court correctly found in disposing of Churchill's due process claim, "the hospital's policy *requires* supervisors to provide [employees] notice and an

opportunity to present their case and discuss their point of view." (App. 72) (emphasis added). Since the Hospital's policy provided for the procedures the court of appeals (erroneously) found lacking, Churchill cannot be heard to claim (and did not claim) that the Hospital had a policy of conducting inadequate investigations.

B. The Hospital Had No Policy of Terminating Employees Who Criticized Hospital Policy.

Churchill claims that the Hospital is liable under Section 1983 because she was fired pursuant to a policy "requiring that all employees of the Hospital . . . who criticize Hospital policy, do so only by directing such criticism to supervisory personnel." (R. 146, pp. 6-7).[41] The court of appeals noted in a footnote that it was unable to determine the actual Hospital policy because of conflicting evidence. (App. 27 n.11). But the evidence cited by the court does not support the existence of the policy alleged by Churchill.

The Hospital's employee handbook set forth the Hospital's policy regarding employee speech. The handbook stated that one of the Hospital's "Human Resources objectives" was to "assure employees of their right to freely discuss with supervision any matter concerning their own or the Hospital's welfare." (R. 72, Complaint Ex. B, Employee Handbook). Churchill attempts to twist this pro-speech policy into one restricting speech by reading it as if it said "freely discuss *only* with supervision." There is no evidence that the Hospital ever read its policy

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[41] In *Pickering*, the Court suggested that such a policy might be constitutional. 391 U.S. at 572 n.4.

this way.[42] Comments of the type Churchill claims to have made about the Hospital's cross-training program were frequently voiced by other employees. The Hospital took no adverse action against any of these employees.[43]

Churchill also cited excerpts from the depositions of Magin and Hopper in support of her "supervisors only" policy claim. But Magin's comments indicate only that Hospital managers, like managers everywhere, might become upset if employees went over their heads or criticized them personally behind their backs. (R. 143, Magin Dep. 11/20/87, pp. 71, 79-80). The First Amendment does not proscribe such a natural human reaction. It proscribes only *retaliation* based on protected speech, and there was none here. As for Hopper's comment that Churchill's statements to Graham were made in a "wrong forum," Hopper was merely suggesting that Churchill was making negative comments to a cross-trainee whom she should have been encouraging to work in the OB Department.[44] He was not saying that the Hospital prohibited employees from discussing policies with their co-workers – something which the record reveals occurred frequently with the full support of Hospital administrators.

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[42] It is common for employers to have "open door" policies encouraging employees to bring problems to the attention of supervisors or management, so that the problems can be corrected. (*See e.g.*, A.B. Hartstein, *Employer's Guide to Auditing Personnel and Employment Practices*, pp. 5.61-5.62 (1988) (R. 136, Defendant's Memorandum in Support of Summary Judgment, Attachment).

[43] *See* discussion *supra*, pp. 7-8.

[44] *See* discussion *supra*, pp. 15-16.

C. The Hospital Cannot Be Held Liable Merely Because Hopper Approved the Decision to Terminate Churchill.

The court of appeals also stated that the Hospital might be liable for any violation by Hopper because under the Hospital by-laws, he had the "responsibility of 'developing and maintaining . . . personnel policies.' " (App. 27 n.11). In so doing, the court cut short the appropriate analysis under this Court's municipal liability decisions, and thus came to an erroneous conclusion.

The identification of those officials whose decisions represent the official policy of a municipality is "a question of *state law*." *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989) (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion)) (emphasis in original). Once such officials have been identified, "it is for the jury [or the judge on summary judgment] to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . or by acquiescence in a longstanding practice or custom." *Id.* (emphasis in original).

Here, as a matter of law, the Hospital's board of directors was the sole governmental body responsible for *setting* Hospital policy. *See* Ill. Rev. Stat. ch. 23, ¶ 1264 (1987) ("The board of directors of a District shall possess and exercise all of its legislative and executive powers"). Although the board could delegate its executive or ministerial duties to Hopper (*see id.*, ¶ 1267), it could not and did not delegate its legislative duties, *i.e.*, its authority to set Hospital policy. The policies "developed and maintained" by Hopper still had to be approved by the board.

There is no evidence that the board adopted any policy "which affirmatively command[ed] that [Churchill's termination] occur." *Jett*, 491 U.S. at 737. Nor is there any evidence that the board acquiesced in any longstanding custom or practice of Hospital administrators terminating employees for exercising First Amendment rights.

Id. To the contrary, the employee handbook (which stated official Hospital policy regarding such matters) encouraged employees to express their concerns, and none of the many employees who discussed cross-training was disciplined in any way.[45] Even if, as Churchill alleges, Hopper's approval of her termination violated the Hospital's policy and practice of encouraging speech, this single act would not have constituted a new policy. "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Praprotnik*, 485 U.S. at 127; *see also Auriemma v. Rice*, 957 F.2d 397, 400-01 (7th Cir. 1992) (executive does not set policy each time he makes a decision).

Accordingly, the Hospital cannot be held liable solely because Hopper approved Churchill's termination.

CONCLUSION

For all the foregoing reasons, Petitioners request that this Court reverse the judgment of the court of appeals.

Respectfully submitted,

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[45] *See* discussion *supra*, pp. 7-8, 47-48.